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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-539

UNIROYAL, INC.,

Petitioner,

v.

LOUISVILLE CHEMICAL CO.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement of the Case

Below, Respondent, a former distributor-customer of Petitioner-manufacturer, was awarded treble damage relief as a consequence of its having been injured by Petitioner's antitrust law violations. The violations are not in dispute. For example, the Trial Court, affirmed by the Court of Appeals for the Second Circuit, found that Petitioner's illegal conduct:

> "* * * consists of extensive and aggravated misconduct over a period of several years, which has substantially

> rigidified the price structure of an entire market and suppressed competition over a wide area * * *" (A113)*

The injury to Respondent arose out of its having been illegally cut-off and blacklisted because of its refusal to adhere to Petitioner's unlawful scheme (A116).**

Petitioner now seeks this Court's aid in escaping the necessity of compensating Respondent for the injury.

The questions presented for review, as we show below, are obviously of interest only to the parties and of no importance or significance to the public. Consequently, grant of certiorari is not warranted. *Rice* v. *Sioux City Memorial Park Cemetery,* 349 U.S. 70, 79 (1955).

Question No. 1

Respondent is entitled to a treble damage award under the rule in *Zenith.*

Underlying Facts

On this question, it stands undisputed that Respondent, previously one of Petitioner's distributors, was unlawfully cut-off and blacklisted in 1963 for failure to adhere to Petitioner's illegal market scheme in violation of Section 1 of the Sherman Act. The effect of Petitioner's Sherman Act violations persisted through at least 1969. Between

* The reference "A—" throughout is to the Appendix to the Petition filed by Uniroyal, Inc.

** Plaintiffs below have also filed a Petition for Writ of Certiorari to the Second Circuit Court of Appeals, No. 71-537.

1963 and 1969, Respondent made undercover purchases of the product but at higher prices and was never able to obtain a sufficient quantity to fill its needs. Consequently, Respondent lost profits both as a result of the higher prices it had to pay and as a result of being unable to obtain a sufficient supply.

The Court of Appeals found as fact that Respondent could not have determined the extent of its damages, as of the time of the illegal 1963 cut-off, because Respondent could not then know how long Uniroyal's illegal conduct would persist and the extent of its ability to purchase in the undercover market or at what price (A118-119). Therefore, expressly following the rule of *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971), the Court of Appeals held that Respondent was entitled to recover those damages for the period beginning in 1964 which could not be proved with reasonable certainty in 1963.

Argument

The exact question posed by Petitioner was raised and decided by this Court, some six months ago, in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321. Petitioner contends that it wishes this Court to consider whether the *Zenith* rule should apply when the illegal acts that caused antitrust damage occurred outside the limitations period. But, in his opinion in *Zenith*, Mr. Justice White, speaking for the Court, made clear that damage-producing conduct occurring outside the limitations period was the precise issue there being decided:

> "* * * the only issue still remaining * * * is whether Zenith can recover in its 1963 suit for damages suf-

fered after June 1, 1959 as the consequence of pre-1954 conspiratorial conduct." (401 U.S. at 338)

That issue having already been decided in the last term of this Court, no public purpose would be served by considering it again at this term.

Uniroyal also requests that this Court distinguish between continuing violations and single act violations. However, that issue too was disposed of in *Zenith*. This Court carefully explained, 401 U.S. at 338, that a continuing violation was composed of a plurality of separate acts and the statute of limitations was to be applied separately to each separate act coupled with its own proximately caused damage.*

The public policy considerations which led to the *Zenith* construction of 15 U.S.C. §15(b) had nothing to do with how many different illegal acts may have been committed, whether one or several. In *Zenith*, the cause of action, for limitations purposes, "accrued" when the resulting damages stemming from each particular illegal act became ascertainable. The Court of Appeals below expressly and literally followed that rule. Consequently, there is nothing further for this Court to review.

The Trial Court, affirmed by the Court of Appeals, held that Petitioner's efforts at price fixing continued into 1968 (A59), that the geographical restrictions continued through 1968 (A43-44), that further cut-offs for violating Petitioner's resale dictates occurred through 1968 (A55, 57, 60) and

* In any event, in this case, the Courts below expressly found that overt acts of antitrust violation actually continued into the limitations period.

that container coding, a practice used to identify price cutters, continued through 1969 (A95). Such findings that Uniroyal was engaging in antitrust violations which affected Respondent until 1969 required the Court of Appeals below to apply the rule in *Zenith*.

In *Zenith*, this Court recognized the necessity of reconciling the statute of limitations with congressional policy of utilizing private actions to insure compliance with antitrust policy. This Court acknowledged that application of the statute of limitations as now urged by Petitioner would contravene public policy. To avoid that result, this Court held that the cause of action to which the statute of limitations applies "accrues" only when the damages suffered as a result of the unlawful act have themselves become certain or capable of precise determination and that any such damages occurring within four years from the date of filing of the complaint are recoverable, regardless of when the unlawful act itself occurred.*

This Court noted that any other construction would defeat

> "the congressional purpose that private actions serve 'as a bulwark of antitrust enforcement' and that the antitrust laws fully 'protect the victims of the forbidden practices as well as the public.'" [401 U.S. at 340]

At 401 U.S. 340, this Court set out the test to use in cases of this type:

> "We must now determine whether Zenith could have recovered those damages if it had brought suit

* 401 U.S. at 339-340.

for them in 1954, for if it could not, it would follow for the reasons stated above that it must be permitted to recover them now."

The Court of Appeals in the instant case precisely and correctly followed the mandate of this Court, stating:

> "Applying *Zenith* to the instant case, in order to hold that Louisville's entire claim accrued when it was unlawfully terminated in 1963, we would have to be able to say that it could have proved its damages with sufficient certainty at that time to warrant a judgment in its favor for the entire period during which Uniroyal was engaging in antitrust violations that affected it. Obviously, in light of Judge Mansfield's finding that the effects of Uniroyal's unlawful restraints endured until 1969, such a statement could not be justified. Louisville had no means of knowing to what extent it would be able to fill its requirements of MH-30 from other distributors or at what price. Indeed, if Louisville had asserted in 1963 that it would lose all sales, and had endeavored to compute damages on that basis we can be quite confident that Uniroyal would have forcefully contended that this was not necessarily so.
>
> "For these reasons, we hold that Louisville is entitled to recover threefold those damages for the period beginning in May 1964 which could not be proved with reasonable certainty in late 1963." (A118-119)

This Court having ruled on the subject and the Court of Appeals having followed the rule, no reason for review exists.

In an attempt to erect some reason for review, Petitioner alleges a conflict between the Second Circuit's hold-

ing here and the rulings of the Sixth and Ninth Circuits in *Garelick* v. *Goerlich's Inc.*, 323 F.2d 854 (6th Cir. 1963) and *Steiner* v. *20th Century-Fox Film Corp.*, 232 F.2d 190 (9th Cir. 1956). But, both cases relied upon by Petitioner as allegedly creating the conflict were before the Court in *Zenith*, having been cited by the parties. *Steiner* is cited at pages 37 and 38 of the brief for Hazeltine and page 17 of the brief for Zenith. *Garelick* is cited at page 34 of Hazeltine's main brief and again at page 4 of its reply brief. Likewise, the identical public policy arguments raised by Petitioner were also before the Court in *Zenith*.*

The short answer to Petitioner's contentions is that the rule of *Zenith* and not that of *Garelick* or *Steiner* applies to the facts of this case.

Zenith takes precedence over *Garelick* and *Steiner* and is now the law of the land as was specifically recognized by the Second Circuit below. In *Railing* v. *United Mine Workers of America*, 445 F.2d 353 (4th Cir. 1971), cited at page 13 of the Petition, the Fourth Circuit expressly followed the *Zenith* rule at the express direction of this Court and awarded damages based upon the identical considerations that were applied to this case by the Second Circuit. Thus, the only two Courts that have spoken since *Zenith* are in accord.

The Second Circuit correctly applied *Zenith* v. *Hazeltine* to the facts of this case. There is no conflict among the circuits, and the applicable law is fully settled. Further review by this Court is unnecessary.

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* The public policy arguments by Hazeltine were substantially the same as those erected by Petitioner here when it relies upon *Guaranty Trust Co. of New York* v. *United States*, 304 U.S. 126 (1938) and *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342 (1944). See, *e.g.*, page 74 of the brief for Hazeltine.

Question No. 2

Respondent's damage period runs from the date of the complaint.

Underlying Facts

The action below was commenced by The Ansul Company on May 31, 1968. Within a very few days, Petitioner commenced some eight lawsuits in different district courts against various customers of The Ansul Company, including Respondent Louisville Chemical Co. The Ansul Company moved to restrain prosecution of the eight lawsuits brought by Petitioner. The Trial Court, lacking power to order consolidation, restrained prosecution of the other suits but asked, with the approval of Petitioer-Uniroyal, that the parties to the other actions, including Respondent-Louisville Chemical Co., voluntarily join in the New York action, the action below. Respondent, previously a party to a Kentucky action, complied.

On these unique circumstances, the courts below found that the effective date of the "Amendment to Complaint" was May 1968 (A89, 119, 122) even though the formal joinder and filing did not occur until November 1968.

Petitioner admits (at page 16 of its Petition) that the original complaint gave notice of an assertion of a Sherman Act violation but now alleges that the notice was insufficient. The original complaint asserts that Petitioner-Uniroyal:

> "• • • has combined and conspired to restrain and combined and conspired to monopolize interstate and

foreign trade and commerce in salts of maleic hydrazide, and other compounds, in violations of Sections 1 and 2 of the Sherman Act." (A130)

In the "Amendment to Complaint" it is again asserted that Petitioner-Uniroyal

> "(a) engaged in a plan, agreement, combination and conspiracy in unreasonable restraint of trade and foreign commerce in plant growth regulants in violation of Section 1 of the Sherman Act;
>
> "(b) engaged in a plan, agreement, combination and conspiracy to monopolize the aforesaid interstate and foreign trade and commerce in plant growth regulants in violation of Section 2 of the Sherman Act." (A135)

Argument

The underlying law is Rule 15(c) of the Federal Rules of Civil Procedure. It provides that an amended complaint relates back to the date of the original complaint. Both courts below found as fact that the "Amendment to Complaint" filed by Respondent was effective as of the date of the original complaint.

The record below clearly supports that finding of fact. From the very beginning of this action, all parties and the Trial Court treated Ansul's original complaint, which placed Uniroyal on notice of its antitrust violation, as being filed on behalf of itself and its customers including Louisville Chemical. When requested to do so, Ansul's customers intervened in the New York action without objection by Uniroyal. It is no bar to the relation back doctrine that Louisville intervened in the case subsequent to the filing of

the original complaint. *Staggers* v. *Otto Gerdau Company,* 359 F.2d 292 (2nd Cir. 1966).

The cases cited by Petitioner as allegedly conflicting with the Second Circuit rule as applied below are factually inapposite. Petitioner has not cited a case involving voluntary intervention by a party to another action by agreement of all parties and at the behest of the Trial Court. Simple equity and fair dealing would serve to grant the Respondent at least the same rights it would have had if it had not intervened in New York to save judicial resources but had instead pursued its remedy in the original action in Kentucky.

No public purpose would be served by review of a simple finding as to the effective date of an amended complaint. The Court of Appeals considered the very question raised here by Petitioner, not once but twice, and affirmed the finding below. It is obvious therefore that the finding in question is not clearly erroneous. Certiorari should not be granted to review evidence and discuss specific facts. *United States* v. *Johnston,* 268 U.S. 220, 227 (1925); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275 (1949).

Conclusion

The Petition does not state any issues of public interest. No conflict between the Circuits has been shown. Petitioner is simply dissatisfied with the results below and

wishes this Court to review the record and substitute its own findings for the facts found below. That is not the function of this Court. The Petition should be denied.

Respectfully submitted,

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